

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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MARC S. KIRSCHNER,	:	ELECTRONICALLY FILED
As Trustee of the Refco Private Actions Trust	:	07 MDL 1902 (JSR)
	:	
Plaintiff,	:	07 Civ. 8165 (JSR)
	:	
-v-	:	Hon. Jed S. Rakoff
	:	
PHILLIP R. BENNETT, SANTO C. MAGGIO,	:	
ROBERT C. TROSTEN, MAYER BROWN,	:	
LLP, MAYER BROWN INTERNATIONAL	:	
LLP, and GRANT THORNTON LLP,	:	
	:	
Defendants.	:	
	:	
-----X	:	

**RESPONSE OF CERTAIN DEFENDANTS IN *KRYS v. SUGRUE* TO
SPHINX PLAINTIFFS' OBJECTION TO THE REPORT AND RECOMMENDATION
OF THE SPECIAL MASTER ON GRANT THORNTON'S MOTION TO DISMISS
FOR LACK OF STANDING DATED FEBRUARY 14, 2011**

The plaintiffs in *Krys v. Sugrue*, Nos. 08 Civ. 3065, 08 Civ. 3086 (the “SPhinX Plaintiffs”), have objected to a February 14, 2011 Report & Recommendation (“R&R”) issued, not in their case, but in the Private Actions Trust case. The SPhinX Plaintiffs are not parties to the Private Actions Trust case. Yet, they contend that the Special Master’s R&R mischaracterizes their claims and highlights defects in a *different* report that he previously issued in the case in which they *are* parties – the February 3, 2010 “SPhinX Standing R&R” in *Krys v. Sugrue*.¹ The undersigned defendants in *that* case, *Krys v. Sugrue*, accordingly are constrained to

¹ See *Krys v. Sugrue*, Report and Recommendation of the Special Master on the Omnibus Issue of Standing (Feb. 3, 2010).

submit this brief response to explain why the Court should not entertain the SPhinX Plaintiffs' submission.

The SPhinX Plaintiffs have no standing to object to a report and recommendation in the Private Actions Trust case. They are not parties to the case, and the R&R is not entered against them; accordingly, they should not be heard to object to it. *See generally Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (school board member and parent who was not a party in district court could not appeal from a judgment against the board). To the extent the SPhinX Plaintiffs believe the R&R erroneously describes their complaint in *Krys v. Sugrue*, nothing in this R&R will constrain them from so arguing in *Krys v. Sugrue*²—and, similarly, nothing will constrain the defendants in *Krys v. Sugrue* from arguing to the contrary.

To the extent the SPhinX Plaintiffs are really objecting to the result of the SPhinX Standing R&R, this is obviously not the forum in which to raise such an objection. Indeed, the SPhinX Plaintiffs already filed objections to that Report, but the Court adopted the Report's conclusions and thus rejected those objections. *See Krys v. Sugrue*, Order of March 31, 2010. The SPhinX Plaintiffs should not be permitted to raise new objections to the SPhinX Standing R&R in a *different* case to which they (and most of these defendants) are not even parties. Accordingly, the SPhinX Plaintiffs' objection should not be considered at all.

If the Court does not reject the objection outright, it should at a minimum postpone any decision on this objection until after it rules on the pending objections to the Special Master's December 6, 2010 Report and Recommendation concerning *in pari delicto* in *Krys v. Sugrue*. If

² The SPhinX Plaintiffs' objection indicates that they intend to file a motion for leave to amend their complaint and for leave to submit further briefing on standing in *Krys v. Sugrue*. Obj. at 10. The undersigned defendants do not believe there is any proper basis for such a motion or for further briefing. Indeed, there is nothing "new," "previously un-briefed [or] un-argued," *id.*, about the SPhinX Plaintiffs' contentions in this exhaustively litigated case. Nonetheless, we will respond to any such requests in *Krys v. Sugrue* in due course, if and when they are filed.

the Court were to adopt that Report and Recommendation, all of the SPhinX Plaintiffs' claims against all of the undersigned defendants would be dismissed with prejudice, and it would be unnecessary for the Court to consider this objection.

Dated: New York, New York
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of March 2011, a copy of the RESPONSE OF CERTAIN DEFENDANTS IN *KRYS v. SUGRUE* TO SPHINX PLAINTIFFS' OBJECTION TO THE REPORT AND RECOMMENDATION OF THE SPECIAL MASTER ON GRANT THORNTON'S MOTION TO DISMISS FOR LACK OF STANDING DATED FEBRUARY 14, 2011 was filed with the Court through the CM/ECF system . The foregoing was served on counsel of record via the Court's CM/ECF system.

/s/ Saverino Mercadante
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